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11 Uptime Sports Nutrition Inc. and
12 Uptime Energy Inc.

13 UNITED STATES DISTRICT COURT
14 CENTRAL DISTRICT OF CALIFORNIA
15 WESTERN DIVISION

16 UPTIME SPORTS NUTRITION INC.;
17 UPTIME ENERGY INC.,

18 Plaintiffs,

19 v.

20 UP ENERGY DRINK LLC

21 Defendant.

Case No. 2:17-cv-4396

COMPLAINT FOR FEDERAL
TRADEMARK INFRINGEMENT,
UNFAIR COMPETITION, DILUTION
AND FALSE DESIGNATION OF
ORIGIN; FOR STATE LAW UNFAIR
COMPETITION AND FALSE
ADVERTISING; FOR STATE AND
COMMON LAW TRADEMARK
INFRINGEMENT; AND FOR
INJUNCTIVE RELIEF;

DEMAND FOR JURY TRIAL

COMPLAINT

1. This is an action by Uptime Sports Nutrition Inc. and Uptime Energy Inc. (“Plaintiffs”) against Defendant Up Energy Drink LLC (“Defendant”) for federal trademark infringement, dilution and federal false designation of origin, state unfair competition and false advertising, and state and common law trademark infringement and trade dress infringement. These claims are brought in connection with Defendant’s use of: the trademark element “UP,” a trade name dominated by the element “UP,” a logo and trade dress that are dominated by “UP,” and marketing and branding elements that are confusingly similar to Plaintiff’s registered and unregistered trademarks UPTIME and Plaintiffs’ trade dress. Defendant’s intentional use of marketing and branding elements confusingly similar to Plaintiffs’ trademarks, trade dress, and trade name violates the Lanham Act §§ 1051 through 1127, California Business & Professions Code §§ 17200, et seq., and 17500, et seq., and common law. Plaintiff seeks injunctive and monetary relief.

Parties

2. Plaintiff Uptime Sports Nutrition Inc. is a Delaware corporation with a principal place of business at 7930 Alabama Avenue, Canoga Park, California 91304. Plaintiff is in the business of creating, selling, and marketing beverages and nutritional supplements.

3. Plaintiff Uptime Energy Inc. is a California corporation with a principal place of business at 7930 Alabama Avenue, Canoga Park, California 91304. Plaintiff is a wholly-owned subsidiary of Uptime Sports Nutrition Inc.

4. On information and belief, Defendant is a Texas limited liability company with a principal place of business at 1819 Taylor Avenue, Suite B, Louisville, Kentucky 40213. On information and belief, Defendant is a nutritional beverage company organized in January 2017.

Jurisdiction and Venue

5. This Court has subject matter jurisdiction over this dispute pursuant to Lanham Act, 15 U.S.C. §§ 1121, 1125(a) & (c), 28 U.S.C. §§ 1331, 1337 & 1338, and the Court's pendent and ancillary jurisdiction pursuant to 28 U.S.C. § 1367.

6. This Court has personal jurisdiction over Defendant because Defendant is selling the beverage product, in the wrongful manners that Plaintiff complains of, in California.

7. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391(b) & (c) because, on information and belief, Defendant regularly transacts business within this district and the events giving rise to Plaintiffs' claims occurred within this district.

Facts

8. Plaintiffs own numerous United States Trademark Registrations for the term "UPTIME"—which is dominated by the element "UP"—including for "nutritional food supplements" (Reg. No. 1448113) and "dietary supplemental drinks; dietary supplements; food supplements; herbal supplements; nutritional supplements" and "energy drinks; sports drinks" (Reg. No. 4781004). In addition, Plaintiffs own the UPTIME logo (with "UP" bolded) for "energy drinks; sports drinks, namely, energy drinks; sports drinks, namely, performance drinks" (Reg. No. 4719491). Plaintiffs also own common law rights in its registered marks. Collectively, these marks constitute the "UPTIME Marks."

9. Plaintiffs also own trade dress rights in their UPTIME nutritional supplement drink's inherently distinctive bottle design and are actively and broadly selling their UPTIME nutritional supplement drink in interstate commerce, including in California. The narrow, aluminum bottle is white with mostly black lettering. It features the word UPTIME with "UP" bolded, and the logo incorporates an arrow emerging upwards from the "U" in "UP".

1 10. Plaintiffs market and sell their UPTIME nutritional supplements and
2 beverages to highly active people, a significant and important subset of those people
3 being athletes.

4 11. As a result of Plaintiffs' expenditures and efforts, the UPTIME Marks
5 and Plaintiffs' inherently distinctive bottle design have come to signify the high
6 quality of the beverages and nutritional supplements designated by the UPTIME
7 Marks and the bottle design, and acquired incalculable distinction, reputation, and
8 goodwill belonging exclusively to Plaintiffs.

9 12. On information and belief, Defendant, without Plaintiffs' authorization,
10 has begun marketing and selling a new "UP" sports beverage packaged in a white
11 aluminum bottle. Defendant's "UP" bottle packaging is dominated by the word
12 "UP," features primarily black lettering, and is comprised of a slender, white alumi-
13 num can. Defendant's "UP" bottle features a logo that includes "UP" with an up-
14 wards arrow emerging from lettering.

15 13. Defendant's use of "UP" and its bottle design are confusingly similar to
16 Plaintiffs' mark UPTIME and Plaintiffs' bottle design.

17 14. Defendant's UP beverages are of the same nature as Plaintiffs' UPTIME
18 beverages.

19 15. Defendant's UP beverages are sold and marketed in interstate commerce
20 in trade channels that overlap with those used by Plaintiffs in selling and marketing
21 their UPTIME beverages.

22 16. Defendant's UP beverages are sold and marketed to classes of consum-
23 ers that overlap with classes of consumers to which Plaintiffs sell and market their
24 UPTIME beverages.

25 17. Plaintiffs have received numerous consumer comments and inquiries
26 that reflect actual marketplace confusion between Defendant's use of "UP" and its
27 bottle design and Plaintiffs' UPTIME Marks and bottle design.

COUNT TWO

(TRADEMARK INFRINGEMENT UNDER COMMON LAW)

23. Plaintiffs repeat and reallege paragraphs 1 through 22 hereof, as if fully set forth herein.

24. By reason of Plaintiffs' continuous use and promotion of its UPTIME Marks and trade dress, as well as the distinctiveness of those trademark elements, consumers associate and recognize those trademark elements as representing a single source or sponsor of Plaintiffs' goods, and therefore Plaintiffs' trademarks are protectable at common law.

25. Defendant's use of its UP mark and related trade dress in connection with the advertising, distribution, marketing, promotion, offer for sale, and/or sale of Defendant's products is likely to cause confusion and has caused confusion as to the source of Defendant's products, in that customers will be likely to associate or have associated such products as originating with Plaintiffs, all to the detriment of Plaintiffs.

26. Upon information and belief, Defendant has committed the foregoing acts of infringement with full knowledge of Plaintiffs' prior rights in their UPTIME Marks and related trade dress rights, and with the willful intent to cause confusion and trade on Plaintiffs' goodwill.

27. By reason of Defendant's actions alleged herein, Plaintiffs have suffered, and will continue to suffer, irreparable injury to their rights, and have suffered, and will continue to suffer, substantial loss of goodwill and loss in the value of Plaintiffs' trademarks unless and until Defendant is enjoined from continuing its wrongful acts.

COUNT THREE

(UNFAIR COMPETITION AND FALSE DESIGNATION OF ORIGIN
UNDER LANHAM ACT 43(a))

28. Plaintiffs repeat and reallege paragraphs 1 through 27 hereof, as if fully set forth herein.

29. Defendant's unauthorized use in commerce of its UP mark and related trade dress is likely to deceive consumers as to the origin, source, sponsorship, or affiliation of Defendant's goods, and is likely to cause consumers to believe, contrary to fact, that Defendant's goods are sold, authorized, endorsed, or sponsored by Plaintiffs, or that Defendant is in some way affiliated with or sponsored by Plaintiffs.

30. Upon information and belief, Defendant has committed the foregoing acts of infringement with full knowledge of Plaintiffs' prior rights in their UPTIME Marks and related trade dress rights, and with the willful intent to cause confusion and trade on Plaintiffs' goodwill.

31. Plaintiffs are entitled to, among other relief, injunctive relief and an award of actual damages, Defendant's profits, enhanced damages, reasonable attorneys' fees, and costs of the action under Sections 34 and 35 of the Lanham Act, 15 U.S.C. §§ 1116, 1117, together with prejudgment and post-judgment interest.

COUNT FOUR

(TRADEMARK DILUTION UNDER LANHAM ACT § 43(c))

32. Plaintiffs repeat and reallege paragraphs 1 through 31 hereof, as if fully set forth herein.

33. Plaintiffs' UPTIME mark and related trade dress are famous, as the term is used in 15 U.S.C. §1125(c), and were famous before Defendant's first use of UP or its associated trade dress as a trademark based on the extensive nationwide use, advertising and promotion.

1 4. Grant such other and further relief as the Court deems just.

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3
4 DATED: June 13, 2017

VALLE MAKOFF LLP

5
6 By: /s/ Jeffrey B. Valle
7 Jeffrey B. Valle
8 Attorneys for Plaintiffs
9 UPTIME SPORTS NUTRITION INC.
10 and UPTIME ENERGY INC.

11 Of Counsel:

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JURY DEMAND

Plaintiffs demand a jury trial in this matter as to all matters triable by a jury.

DATED: June 13, 2017

VALLE MAKOFF LLP

By: /s/ Jeffrey B. Valle

Jeffrey B. Valle

Attorneys for Plaintiffs

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